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DIRECTOR OF CENTRAL INTELLIGENCE

The Senate resumed the consideration of the nomination of John A. McCone, of California, to be Director of Central Intelligence.

Mr. CLARK. Mr. President, I intend to address myself briefly, tomorrow, to the question of the proposed confirmation of the nomination of Mr. McCone to be Director of the Central Intelligence Agency.

However, I should like at this time to have printed in the RECORD, first, a copy of a memorandum on the conflict-of-interest point, prepared at my request by the Office of the Legislative Counsel. I ask unanimous consent that it may be printed at this point in the RECORD, in connection with my remarks.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

MEMORANDUM FOR SENATOR CLARK

This memorandum is written in response to your telephone request to this office on January 26, 1962, regarding the conflict-of-interest implications which might arise in the event that Mr. John A. McCone, who has been nominated by the President for the office of Director of the Central Intelligence Agency, is confirmed for that office by the Senate.

According to information furnished this office by you, Mr. McCone has substantial financial holdings in Standard Oil of California, trans-world carriers, and other shipping interests. Such information does not indicate whether Mr. McCone is an officer of any company or business organization, and it is not known to what extent, if any, the Central Intelligence Agency transacts business with those companies in which Mr. McCone holds a financial interest.

PROVISIONS OF LAW INVOLVED

Any conflict of interest likely to arise in the case of the Director of the Central Intelligence Agency (hereafter referred to as CIA) as a result of financial holdings by him of the nature referred to above would probably occur in connection with purchases and contracts made by the CIA. The conflict-of-interest statute which would be brought into question in such a situation is section 434 of title 18, United States Code, which provides:

"§ 434. Interested persons acting as Government agents

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

The procurement authority of the CIA is contained in section 3 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a-403j). It provides:

"PROCUREMENT AUTHORITIES

"SEC. 3. (a) In the performance of its functions the Central Intelligence Agency is authorized to exercise the authorities contained in sections 2(c) (1), (2), (3), (4), (5), (6), (10), (12), (15), (17), and sections 3, 4, 5, 6, and 10 of the Armed Services Procurement Act of 1947 (Public Law 413, Eightieth Congress, second session) [now contained in chapter 137 of title 10, U.S.C.].

"(b) In the exercise of the authorities granted in subsection (a) of this section, the term "Agency head" shall mean the Director, the Deputy Director, or the Executive of the Agency.

"(c) The determinations and decisions provided in subsection (a) of this section to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (d) of this section, the Agency head is authorized to delegate his powers provided in this section, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the Agency.

"(d) The power of the Agency head to make the determinations or decisions specified in paragraphs (12) and (15) of section 2(c) and section 5(a) of the Armed Services Procurement Act of 1947 shall not be delegable. Each determination or decision required by paragraphs (12) and (15) of section 2(c), by section 4 or by section 5(a) of the Armed Services Procurement Act of 1947 [now contained in chapter 137 of title 10, U.S.C.], shall be based upon written findings made by the official making such determinations, which findings shall be final and shall be available within the Agency for a period of at least six years following the date of the determination."

It should be noted that the term "Agency head" as used in section 3(d) above is defined in subsection (b) to mean the Director, or the executive of the Agency.

Mississippi Valley Generating Case

The most recent decision of the Supreme Court of the United States construing the provisions of section 434 of title 18, United States Code, is the case of the *United States* v. *Mississippi Valley Generating Company* (364 U.S. 520 (1961)).

In that case one Wenzell was an unpaid part-time consultant to the Bureau of the Budget in connection with preliminary negotiations which eventually led to a contract for the construction and operation of a powerplant to provide electric power for the Atomic Energy Commission. At the time such negotiations were being carried out Wenzell was also an officer and shareholder of an investment banking firm which was expected to profit, in the event the contract negotiations were successful, by becoming the financial agent for the project to be undertaken under the contract. The Court held that there was a conflict of interest on the part of Wenzell and that:

"Section 434 forbids a Government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interest, he may benefit financially from the outcome of those transactions" (p. 562).

The Court was careful to emphasize that the holding quoted above was limited to the specific facts presented in that case. However, that case being the most recent one interpreting section 434, statements made therein by the Court (three Justices dissenting) must necessarily be relied upon in any attempt to determine the applicability of section 434 to a different set of circumstances.

The majority opinion discusses in some detail the origin, purpose, and scope of section 434. In that discussion the Court said:

"First. In determining whether Wenzell's activties fall within the proscription of section 434, we think it is appropriate to focus our attention initially on the origin, purpose, and scope of the statute. Section 434 is one of several penal conflict-of-interest statutes which were designed to prohibit Government officials from engaging in conduct that might be inimical to the best interests of the general public. It is a restatement of a statute adopted in 1863 following the disclosure by a House Committee of scandalous corruption on the part of Government agents whose job it was to procure war materials for the Union armies during the Civil War. The statute has since been reenacted on several occasions, and the broad prohibition contained in the original statute has been retained throughout the years.

"The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing Federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare, *United States* v. *Chemical Foundation* (272 U.S. 1, 16). The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matthew 6: 24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of Government service, or to those Government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes. Rather, it applies, without exception, to 'whoever' is 'directly or indirectly interested in the pecuniary profits or contracts' of a business entity with which he transacts any business 'as an officer or agent of the United States.'

"It is also significant, we think, that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a Government agent fails to act in accordance with that standard he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation (*Rankin* v. *United States* (98 Ct. Cl. 357)).

"While recognizing that the statute speaks in broad, absolute terms, the respondent argues that to interpret the statute as laying down a prophylactic rule which ignores the actual consequences of proscribed action would be a violation of the time-honored canon that penal statutes are to be narrowly construed. But even penal statutes must be 'given their fair meaning in accord with the evident intent of Congress' (*United States* v. *Raynor* (302 U.S. 540, 552); *Rainwater* v. *United States* (356 U.S. 590, 593); *United States* v. *Corbett* (215 U.S. 233, 242)).

"In view of the statute's evident purpose and its comprehensive language, we are convinced that Congress intended to establish a rigid rule of conduct which, as we shall now demonstrate by analyzing each of the elements of the statutory prohibition, was violated by Wenzell" (pp. 548–551).

Particularly worthy of note in the foregoing excerpt (third paragraph) is the Court's construction of the statute to the effect that it establishes an objective stand-

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ard of conduct, and that there is a violation of the statute whether or not positive corruption is involved and whether or not any actual loss is sustained by the Government. The Court indicated that the language of the statute establishes a rigid rule of conduct for Government officers and employees.

The Court rejected the argument of respondent that since Wenzell did not participate in the terminal negotiations which led to the final agreement his actions were too remote and tenuous to be considered "the transaction of business" within the meaning of the statute. In rejecting the argument the majority said:

"To limit the application of the statute to Government agents who participate only in the final formation of a contract would permit those who have a conflict of interest to engage in the preliminary, but crucial stages of the transaction, and then to insulate themselves from prosecution under section 434 by withdrawing from the negotiations at the final, and often perfunctory stage of the proceedings. Congress could not possibly have intended such an obvious evasion of the statute" (pp. 554-555).

This statement by the Court makes it quite clear that an agent of the Government who participates only in the formative stages of a contract may be guilty of conflict of interest even though he does not participate in the terminal negotiations. It does not resolve the question of whether an agent who participates only in the terminal negotiations, particularly if the participation is nothing more than perfunctory, transacts business within the meaning of section 434. It would not be unreasonable to conclude, on the basis of the Court's statement concerning the lack of knowledge of a conflict of interest on the part of Wenzell, that its ruling would be the same in both instances. With respect to that aspect of the case the Court said:

"However, even assuming that Wenzell did not think there was a conflict, that fact is irrelevant. As we have shown, the statute establishes an objective, and not a subjective standard, and it is therefore of little moment whether the agent thought he was violating the statute if the objective facts show that there was a conflict of interest" (p. 560).

In the Mississippi Valley case, the respondent asserted that Wenzell's activities did not fall within the statute because the corporation of which he was an officer had no more than a mere hope that it might receive the financing work if the contract negotiations were successful. Again, the Court rejected the argument saying that:

"If a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing." (p. 555).

This language suggests that certainty of financial gain is not a necessary element of section 434, but that a substantial probability of such gain will suffice under that section. Indeed, the Court in its technical holding held if a Government agent may benefit financially from his transactions he violates the statute (p. 562).

Discussion

Obviously, section 434 would not come into operation if the CIA, during the period of Mr McCone's service as Director, were to have no business transactions with any of the companies in which he may be financially interested. Accordingly, the question to be considered here is whether an individual serving as Director of the CIA would come within the provisions of section 434 if the CIA were to transact business with one or more of the companies in which that Director holds substantial financial interests.

It is believed that the criminal sanctions of section 434 could not be successfully invoked against an officer or employee of the Government, even though that officer or employee possesses substantial financial interest in a company with which the department or agency in which he serves does business, if that officer or employee takes no part in the transaction of that business and has no supervisory or overriding authority with respect to the transaction of that business. The opinion in Mississippi Valley appears to be grounded upon the premise that the chief evil at which section 434 is directed is not the mere fact of the possession by a Government officer of a private financial interest in a business entity, but his undertaking to act on behalf of the Government in a business transaction with a business entity in which he has such an interest. Therefore, assuming that Mr. McCone in his capacity as Director of the CIA could divorce himself completely from any business transactions involving those companies in which he holds a pecuniary interest, he would certainly escape any conflict contemplated by section 434. Whether he could in fact (1) remove himself from all questionable transactions to the degree necessary to insure that no conflict of interest would arise, or (2) remove himself from all questionable transactions and perform the functions of the CIA in the best interests of the Government are questions of fact and policy which must be determined by the President and Senate and, therefore, cannot be answered here.

Conclusions

Although the Court in the Mississippi Valley case was careful to limit its holding to the facts before it in that case, the expressions therein contained would seem to support the following inferences:

1. If Mr. McCone were to serve as Director of the CIA, section 434 of title 18, United States Code, could have no application unless, during his incumbency, the CIA did in fact have business transactions with one or more of the companies in which he then had a financial interest.

2. If in his capacity as Director of the CIA Mr. McCone were to participate on behalf of the Government in a business transaction with a company in which he is financially interested and from which he might realize financial gain, the provisions of section 434 would become applicable whether or not Mr. McCone believed his actions to involve a conflict of interest.

3. The meaning of the term "transacts business," as used in section 434 has not been fully determined. Clearly a direct or indirect personal participation at any stage in the negotiation or execution of a particular contract on behalf of the Government would be included. The decision in Mississippi Valley suggests that the giving of approval to a contract negotiated by others probably would be regarded as such a participation. What other forms of action taken by a Government officer with respect to a contract which may be regarded as participation remains undecided.

Respectfully submitted.

HUGH C. EVANS,
Assistant Counsel.

Mr. CLARK. Mr. President, I ask unanimous consent that the Central Intelligence Agency rules on employee conduct—dealing with conflict of interest, and dated August 29, 1961—be printed at this point in the RECORD, in connection with my remarks.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Pennsylvania?

Mr. SYMINGTON. Mr. President, reserving the right to object, may I first look at the document?

Mr. CLARK. Certainly.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Pennsylvania?

Mr. SYMINGTON. Mr. President, I have a copy of the document of which the paragraphs of the able Senator from Pennsylvania are a part. This document was not furnished by the Central Intelligence Agency to the nominee. He therefore knew nothing of the rules in the document. Fortunately the nominee is completely in the clear because of his position before the Committee.

Mr. CLARK. Mr. President, will the Senator from Missouri yield?

Mr. SYMINGTON. Mr. President, the Senator from Pennsylvania has the floor, and has been kind enough to yield to me.

Mr. CLARK. Of course if the Senator from Missouri does not want this information in the RECORD, and if he therefore wishes to object, I shall be happy to withdraw my request. But these particular rules have been furnished at my request——

Mr. SYMINGTON. No, Mr. President; the Senator from Pennsylvania misunderstood. He is very fair. My point is that these rules and regulations, part of which the able Senator is placing the RECORD, were not given by the CIA to the nominee.

Mr. CLARK. I never said they were.

Mr. SYMINGTON. I know; but I mention this because the nominee has been entirely willing to abide by the committee of the Senate before which he has now appeared, as he was before the other committees before which he previously appeared.

I thank the Senator from Pennsylvania for his courtesy in yielding.

Mr. CLARK. I thank the Senator from Missouri for his courtesy to me, which is always very great, indeed.

Let me ask whether the Senator from Missouri desires to object to the request I have made.

Mr. SYMINGTON. No, Mr. President. I simply wished to make this point for the RECORD.

Mr. CLARK. I thank the Senator from Missouri.

Mr. President, I renew my request.

The PRESIDING OFFICER. Is there objection?

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

CENTRAL INTELLIGENCE AGENCY RULES ON EMPLOYEE CONDUCT, AUGUST 29, 1961

Pursuant to Executive Order 10939, issued May 5, 1961, calling on "each department and agency head (to) review or issue internal directives appropriate to his department or agency to assure the maintenance of high ethical and moral standards therein", the CIA issued rules on "employee conduct" on August 29, 1961. The rules contain the following sections:

"III. SPECIAL PROVISIONS

"b. Conflicts of interest.

"(1) DEFINITION.—A conflict of interest is defined as a situation in which an Agency employee's private interest, usually but not necessarily of an economic nature, conflicts or appears to conflict with his Agency duties and responsibilities. The situation is of concern to the Agency whether the conflict is real or only apparent."

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"(3) Regulatory provisions.

"(c) Financial Interests. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Agency employees."

Mr. CLARK. Mr. President, I now ask unanimous consent to have printed at this point in the RECORD, in connection with my remarks, a memorandum prepared by the Office of the Legislative Counsel for the Senator from Virginia [Mr. BYRD] at the time when the nomination of Mr. McNamara to be Secretary of Defense was presented, because I believe there is some similarity between that situation with respect to possible conflict of interest because of stock holdings and the situation in regard to the nomination of Mr. McCone to be Director of Central Intelligence Agency.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

[U.S. Senate, Office of the Legislative Counsel]

MEMORANDUM FOR SENATOR BYRD OF VIRGINIA

Re possible conflict-of-interest aspects of a trust agreement proposed to be executed by a designee for appointment as Secretary of Defense

This memorandum is transmitted pursuant to your request for comment as to possible conflict-of-interest aspects of the trust agreement returned herewith.

FACTUAL BACKGROUND

It is understood that Mr. Robert S. McNamara, formerly president of the Ford Motor Co., and recently designated for appointment as Secretary of Defense, has indicated that he contemplates entering into a trust agreement in that form for the purpose of placing his personal affairs in such condition that action taken by him in the performance of the duties of the Office of the Secretary of Defense would not place him in violation of the Federal statutes commonly referred to as conflict-of-interest statutes.

For present purposes, the principal features of the proposed trust agreement may be described as follows:

1. Mr. McNamara would transfer to the corporate trustee designated in the agreement certain identified property, and such other property as Mr. McNamara might transfer later to the trustee.

2. For the duration of the trust, the trustee would have full power to invest, reinvest, manage, and control, subject to the investment directions of an investment adviser designated in the agreement, all property transferred by Mr. McNamara to the trustee.

3. The trustee would be authorized to invest the trust property (in conformity with directions received from the investment advisor) "principally in common stock and equity securities," and would not be limited as to any particular class or category of securities.

4. During the existence of the trust, the trustee would pay, from the income and principal of the trust property, to Mr. McNamara and to other persons and organizations designated by Mr. McNamara, such sums as may be prescribed from time to time in written directions given by Mr. McNamara.

5. During the existence of the trust, and while Mr. McNamara serves as Secretary of Defense, neither the trustee nor the investment advisor would disclose to Mr. McNamara or to any other person "any information concerning the investments of the trust estate," except that such information could be given:

(a) to brokers, agents, attorneys, and other persons with whom trust business is transacted;

(b) to Mr. McNamara to the extent required by him "for making reports or returns to any government authority"; and

(c) to Mr. McNamara to the extent that such information reflects the "net income and taxable income of the trust estate."

6. Mr. McNamara would reserve the right at any time to:

(a) alter or revoke the trust agreement;

(b) remove or replace the trustee; and

(c) cause a new investment advisor to be designated.

ASSUMPTIONS MADE

For the purposes of this memorandum it will be assumed that under the proposed plan:

1. Mr. McNamara would not serve concurrently as Secretary of Defense and as an officer, agent, or member of any business entity which transacts business with the Department of Defense.

2. Mr. McNamara, before assuming the office of Secretary of Defense, would dispose of all personal financial interests which might give rise to conflict-of-interest implications, and that during his service as Secretary of Defense he would acquire no such interests other than those which might be acquired by the trustee under the terms of the proposed trust agreement;

3. The trust agreement would be continued in effect without material change by Mr. McNamara during the period of his service as Secretary of Defense;

4. No requirement of State or Federal law would necessitate the disclosure by the trustee to Mr. McNamara of information concerning the identity of corporations or other organizations in which investments had been made by the trustee;

5. Mr. McNamara would not seek or acquire any such information from any other source during his service as Secretary of Defense;

6. Mr. McNamara, while serving as Secretary of Defense, would take no action incident to the procurement of any contract or the prosecution of any claim which might be in violation of section 281 or 283 of title 18 of the United States Code; and

7. While serving as Secretary of Defense, Mr. McNamara would receive no "salary" from any source other than the United States, "in connection with his services as such an official," prohibited by section 1914 of title 18, United States Code.

STATUTE INVOLVED

Upon the assumptions which have been made, any conflict-of-interest implications of the trust agreement which has been described would appear to arise from the provisions of section 434 of title 18, United States Code, which provides:

"§ 434. Interested persons acting as Government agents

"Whoever, being an officer, agent, or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years or both."

DISCUSSION

1. The question presented

There is no indication that Mr. McNamara would continue as an "officer, agent, or member" of any business entity after his appointment as Secretary of Defense. Accordingly, it would seem that the question for consideration is whether his beneficial interest in any securities acquired by the trustee under the proposed trust agreement might bring him into conflict with the section quoted above.

The trust agreement indicates that it is contemplated that the trust property would be invested principally in "common stocks and equity securities." To the extent that such investment were to be made in business entities having no business transactions with the Department of Defense, no problem would occur. However, the proposed trust agreement contains no express limitation with regard to the class of business entities in which trust funds may be invested. Accordingly, it is possible that such funds might be invested in concerns which will be engaged in transacting business with the Department of Defense during Mr. McNamara's service as Secretary. Therefore, the present inquiry requires consideration of the question whether any such investment might bring Mr. McNamara into conflict with the provisions of section 434.

2. Significance of a beneficial interest in securities

If, under the terms of the trust agreement or through any other means, Mr. McNamara were to acquire knowledge of the identity of any corporation in which the trustee had invested trust funds through the purchase of share capital and which was transacting business with the Defense Department, his possession of a beneficial interest in securities of that corporation probably would bring section 434 into application.

In a previous memorandum construing section 434, dated January 19, 1953, this office expressed the following view:

"The evident purpose of that section was to prevent an officer or employee of the United States from transacting business with a corporation or other entity in such a way that his action might result in direct or indirect personal gain through the acquisition of money or some other thing of value. Inclusion of the word 'indirectly' in the phrase 'directly or indirectly interested in the pecuniary profits or contracts of such corporation' suggests that the section extends to private gains which flow recognizably from profits or contracts even though the gains pass through other hands or instrumentalities before realization by the officer concerned.

"In the light of the relationship existing between a corporation and its shareholders, it seems quite clear that the interest of a shareholder in a corporation is of the kind included within that phrase. However, as a criminal statute, section 434 will be strictly construed, and it is very doubtful that the bare existence of such an interest would be regarded as sufficient ground for the visitation of criminal consequences. A clear showing of the presence, in a material degree, of the substantive evil at which the section is directed would seem to be a necessary element of proof. The existence of a nominal or trivial interest, such as the possession of a single qualifying share, or the possession of naked legal title to shares in which the beneficial interest is held by others, probably would not be enough. But a showing of an actual and beneficial interest of such magnitude as to demonstrate a probable influence upon the official actions of the officers concerned would seem to be sufficient."

The foregoing expression assumed knowledge by the shareholder of the identity of the corporation in which his investment was made. It also suggested the probability that the courts might apply to the interest of the shareholder a quantitative test of the magnitude of his interest in determining the application of section 434 to particular cases. The validity of that suggestion has been thrown into question by expressions contained in the majority opinion of the Supreme Court in *United States* v. *Mississippi Valley Generating Co.*, No. 26, October

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Term, 1960, decided January 9, 1961. In that opinion it was stated that section 434 estsblished "an absolute standard of conduct" which leaves no room for equitable considerations (pamphlet opinion, pp. 37, 43). A discussion of possible implications of that opinion is set forth hereinafter.

3. Significance of the element of knowledge

The novel element presented by the instant case arises from the provisions of the trust agreement which (with stated exceptions) appear to be intended to insulate Mr. McNamara from knowledge as to the identity of any business organization in which the trust funds may be invested. That element presents the question whether the possession of such knowledge by Mr. McNamara would be necessary to bring section 434 into application.

Section 434 does not expressly condition its application upon a showing of knowledge by a shareholder of the existence of his interest in a business organization with which he may transact business as a Government officer. Read literally, the section would apply to such a case notwithstanding the fact that the officer concerned in fact had no such knowledge. Any relief from the rigor of such a rule would require an interpretation under which the element of knowledge would be read into section 434 as a matter of Congressional intent or as a requirement necessary to sustain its validity. The legislative history of section 434 provides no answer to the question whether Congress intended such knowledge to be an element of the crime described therein, and no opinion of any Federal court appears to have given express consideration to that particular aspect of section 434. That question was not directly involved in the determination by the Supreme Court of the recent case of *United States* v. *Mississippi Valley Generating Co.*, No. 26, October Term, 1960, decided January 9, 1961.

In some instances the courts will read into a criminal statute a requirement of knowledge that is not set forth by explicit language contained in the statute. In other instances the courts wil decline to do so, and will enforce the statute acording to its literal terms. See Sayre, Francis B., "Public Welfare Offenses," 33 Columbia Law Review 55 (1933). Determination whether a criminal statute falls into one or the other of those categories frequently is difficult. As stated by the Supreme Court in *Morissette* v. *United States*, 342 U.S. 246, 260 (1952):

"Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth a comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. * * *"

In that case the Court held that intent was an essential element of an offense charged under 18 U.S.C. 641 which provides in part that "whoever embezzles, steals, purloins, or knowingly converts" property of the United States is punishable by fine or imprisonment even though intent is not an element specifically prescribed by the statute. The Court said (pp. 260–262):

"Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; * * * State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research.

"Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the sames silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. * * *"

The Court in the Morissette case, however, reaffirmed the decision in the case of *United States* v. *Valint*, 258 U.S. 250 (1922), which held that knowledge was not a necessary element in a violation of the Narcotic Act of December 17, 1914 (38 Stat. 785). In so doing, the Court recognized and discussed the evolution of a class of legal offenses which have become known as "public welfare offenses" in which intent is not an element necessary to the particular offense involved. Commenting upon such offenses, the Court said (pp. 255–256):

"This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called "public welfare offenses." These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."

The offense described by section 434 appears not to be one "well defined in common law," or one for which the state courts "have consistently retained the requirement of intent." It does not appear to be a penal provision having as its main purpose the punishment of an individual for a wrong committed by him, but rather a provision of law enacted primarily for the purpose of protecting the public against persons who might compromise their positions as officers or employees of the Federal Government for their own personal gain. As such, it would appear to fall into the category described by the Supreme Court as "public welfare offenses," with respect to which the courts will not read in a requirement of knowledge which is not expressly set forth in the statute. The reasons for belief that section 434 is to be so regarded are described more fully in the following paragraphs of this memorandum.

4. Implications of the Mississippi Valley Generating Company case

The Mississippi Valley Generating Company case, referred to above, involved the application of section 434 to the activities of one Wenzell who, while serving as a temporary employee of the Bureau of the Budget and contemporaneously as an officer and shareholder of a banking corporation, participated on behalf of the United States in negotiations looking toward the formation of a Government contract in the execution of which that banking corporation might have been expected to participate. The Court held (3 justices dissenting) that section 434 "forbids a government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interests, he may benefit financially from the outcome of those transactions" (Pamphlet opinion, p. 40), and that on the showing made in that case Mr. Wenzell had violated the provisions of that section. Accordingly, it determined that the contract could not be enforced against the Government (Pamphlet opinion, pp. 40–44).

The narrow, technical holding of the majority in that case is not directly determinative of the question considered in this memorandum. However, the majority and minority opinions of the Supreme Court in that case do contain the most recent and the most comprehensive expressions of the Court with respect to the application of section 434.

The following extract from the majority opinion (pamphlet opinion, pp. 26–29) demonstrates the broad scope given to that section by the Court:

"First. In determining whether Wenzell's activities fall within the proscription of Section 434, we think it is appropriate to focus our attention initially on the origin, purpose, and scope of the statute. Section 434 is one of several penal conflict-of-interest statutes which were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public. It is a restatement of a statute adopted in 1863 following the disclosure by a House Committee of scandalous corruption on the part of government agents whose job it was to procure war materials for the Union armies during the Civil War. The statute has since been reenacted on several occasions, and the broad prohibition contained in the original statute has been retained throughout the years.

"The obvious purpose of the statute is to insure honesty in the Government'e business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. *United States* v. *Chemical Foundation*, 272 U.S. 1, 18. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service, or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes. Rather, it applies, without exception, to "whoever" is "directly or indirectly interested in the pecuniary profits or contracts" of a business entity with which he transacts any business "as an officer or agent of the United States."

"It is also significant, we think, that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus di-

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rected not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. *Rankin* v. *United States,* 98 Ct. Cl. 357.

"While recognizing that the statute speaks in broad, absolute terms, the respondent argues that to interpret the statute as laying down a prophylatic rule which ignores the actual consequences of proscribed action would be a violation of the time-honored canon that penal statutes are to be narrowly construed. But even penal statutes must be "given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor,* 302 U.S. 540, 552; *Rainwater* v. *United States,* 356 U.S. 590, 593; *United States* v. *Corbett,* 215 U.S. 233, 242. In view of the statute's evident purpose and its comprehensive language, we are convinced that Congress intended to establish a rigid rule of conduct which, as we shall now demonstrate by analyzing each of the elements of the statutory prohibition, was violated by Wenzell."

The majority opinion clearly indicated that violation of section 434 requires no showing of any harm actually sustained by the Government, saying (pamphlet opinion, p. 37):

"It may be true, as the respondent asserts, that none of Wenzell's activities to which we have alluded adversely affected the Government in any way. However, that question is irrelevant to a consideration of whether or not Wenzell violated the statute. As we have indicated the statute is preventive in nature; it lays down an absolute standard of conduct which Wenzell violated by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute."

The majority took the view that knowledge by Mr. Wenzell with regard to the existence of a conflict of interest arising from his duality of allegiance was immaterial, saying (pamphlet opinion, pp. 38–39):

"However, even assuming that Wenzell did not think there was a conflict, that fact is irrelevant. As we have shown, the statute establishes an objective, and not a subjective standard, and it is therefore of little moment whether the agent thought he was violating the statute, if the objective facts show that there was a conflict of interest."

The majority also rejected the contention that equitable considerations should preclude the application of section 434, saying (pamphlet opinion, pp. 39–40):

"The thrust of the arguments made by the respondent and adopted by the Court of Claims is that it would be unjust to apply the statute to one who acted as Wenzell did in this case. We cannot agree. The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil."

In declining to permit the contract in question to be enforced against the Government, the majority stated (pamphlet opinion, p. 41):

"As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon Government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a Government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.

The majority regarded its determination of nonenforceability to be a necessary consequence of the public policy underlying section 434, saying (pp. 42–43):

"The Court of Claims was of the opinion that it would be overly harsh not to enforce this contract, since the sponsors could not have controlled Wenzell's activities and were guilty of no wrongdoing. However, we think that the court emphasized the wrong considerations. Although nonenforcement frequently has the effect of punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. Cf. *Crocker* v. *United States,* 240 U.S. 74, 80–81. It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. Cf. *Hazelton* v. *Sheckells,* 202 U.S. 71, 79. Therefore, even if the result in a given case may seem harsh, and we do not think that such is the case here, that result is dictated by the public policy manifested by the statute."

The emphasis given by the majority opinion of the Supreme Court in that case to (1) the remedial purpose of section 434, (2) the absolute standard of conduct established thereby, and (3) the immateriality of such factors as actual harm sustained by the Government, corrupt intentions on the part of the Government officer concerned, equitable considerations, knowledge by the actor that he was engaged in activities having conflict of interest implications, or the harshness of consequences which might flow from a strict application of the letter of the statute, suggests that it is more than a mere possibility that the Court might hold that absence of knowledge by a Government officer of the identity of a business organization in which he has a beneficial financial interest would not preclude the application of section 434 to his action in transacting business on behalf of the Government with that organization.

That view is suggested also by the manner in which the Court stated its technical holding. As formulated by the Court (pamphlet opinion, p. 40), its holding appears to lay emphasis upon the prohibition of action taken by an officer in transacting business on behalf of the Government with an organization "if, by virtue of his private interests, he may benefit financially from the outcome of those transactions." This suggests that the chief evil at which the statute is directed is not the possession of a private financial interest by a Government officer in a business entity, but the action of such an officer in undertaking to act for the Government in any dealing with such an organization while he possesses such an interest therein.

Viewed in that light, the expressions of the majority in the Mississippi Valley case suggest more strongly the probability that the Court might consider as immaterial the factor of knowledge by the officer of the existence or nature of his private financial interest. So regarded, the majority opinion would stand for the general proposition that it is the affirmative obligation of one who undertakes to act for the Government in the transaction of business with a private business organization to insure by all means available to him that he does not in fact have a direct or indirect pecuniary interest in that organization.

The minority opinion in the Mississippi Valley case does not appear to be in conflict with that view. Mr. Justice Harlan, writing for the dissenting justices, invited attention to the fact that decision with regard to the element of knowledge in section 434 was not required in that case (pamphlet opinion, p. 3, footnote 3). However, he indicated agreement with the majority of the Court as to the basic purpose and effect of the section by stating (pamphlet opinion, p. 4):

"The policy and rationale of the statute are clear: an individual who negotiates business for the Government should not be exposed to the temptation which might be created by a loyalty divided between the interest of the Government and his own self-interest; the risk that the Government will not be left with the best possible transaction is too great."

The apparent ground for the dissent of three justices was their conviction that section 434 had been misapplied by the majority because at the time of the performance by Mr. Wenzell of his activity on behalf of the Government there was no certainty that the bank corporation with which he was associated would engage in the performance of any contract which might be entered into through the participation of Mr. Wenzell.

If, in a case such as that of Mr. McNamara, a Government officer were to participate in the transaction of business on behalf of the Government with business organizations in which he had in fact a financial interest, and the Court thereafter were to hold his knowledge thereof was immaterial, such a holding would throw into question the validity of all contracts entered into by that officer with such business organizations.

CONCLUSION

For the foregoing reasons, it is considered not improbable that, on the basis of the expressions of the Supreme Court in the Mississippi Valley case, a Federal criminal court might regard the provisions of the trust agreement proposed in the case of Mr. McNamara to be ineffective to preclude the application of section 434 of title 18, United States Code, to any situation in which he were to represent the United States in a transaction with a business organization in which the trustee under that agreement then held securities for the benefit of Mr. McNamara.

Respectfully submitted.

JOHN C. HERBERG,
Senior Counsel.

JANUARY 14, 1961.

Mr. CLARK. Mr. President, I also ask unanimous consent that a statement of facts prepared by my staff, at my request, from the hearings before the Senate Armed Services Committee, dealing with Mr. McCone's financial holdings, including stock in Standard Oil of California, in which the nominee is a substantial stockholder, and certain shipping interests be printed in the RECORD at this point in my remarks.

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There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF FACTS FROM HEARINGS BEFORE SENATE ARMED SERVICES COMMITTEE ON NOMINATION OF JOHN A. McCONE JANUARY 18, 1962

1. STOCKHOLDINGS IN STANDARD OIL OF CALIFORNIA

Mr. McCone stated that he owned a little in excess of $1 million of etock in Standard Oil of California (hearings, p. 55). He stated that the company had "extensive reeerves in Arabia and in the offshore island in the Persian Gulf of Bahrein, and also extensive reserve in Sumatra, and Venezuela" (p. 67).

Standard Oil of California is one of the four companies which makes up the Arabian-American Oil Co. (Aramco), along with the Texas Co., Standard Oil of New Jersey and Mobil Oil. Aramco, according to Mr. McCone, does have relationships with the governments of Arabia and Bahrein (p. 69).

(Note: Standard Oil of California 8/1/61 report to stockholdere lists Mr. McCone as owning 18,318 ehares and as receiving 915 additional shares by way of stock dividend. Totel hoidings: 19,233 shares.)

2. SHIPPING INTERESTS

Mr. McCone stated "I have direct interest in Trans-World Carirers. * * * I have personally acquired and own now the great majority of the stock in San Marino Corp. and Joshua Hendy Corp. ond, therefore, through the sole ownership of Joehua Hendy, practically half of Trans-World Carriers at this point." (p. 66)

Joshua Hendy is exclusively engaged in the shipping business; in carrying ore to the South American trade; and in United States intercoastal trade, principally in chemicals. The company owns three or four ships in the intercoastal trade (pp. 68–69).

Senator CASE of South Dakota indicated that the ships in Mr. McCone's ehipping enterprise and affiliated interests are engaged in carrying oil for Standard Oil of California (p. 57).

Mr. CLARK. Mr. President, I intend tomorrow to address myself more fully to the problem as to whether the Senate should or should not confirm this nomination. I put these memoranda in the RECORD now so that all Senators may be advised of them when the debate resumes tomorrow.

I yield the floor.

ADJOURNMENT TO 11 A.M. TOMORROW

Mr. MANSFIELD. Mr. President, if there is no further business to come before the Senate, I move that the Senate adjourn, under the order agreed to, until 11 o'clock tomorrow morning.

The motion was agreed to; and, as in legislative session (at 5 o'clock and 10 minutes p.m.), under the order previously entered, the Senate adjourned until tomorrow, Tuesday, January 30, 1962, at 11 o'clock a.m.

NOMINATIONS

Executive nominations received by the Senate January 29, 1962:

U.S. ARMS CONTROL AND DISARMAMENT AGENCY

Jacob D. Beam, of New Jersey, to be an Assistant Director, U.S. Arms Control and Disarmament Agency.

U.S. MARSHAL

Alvin Grossman, of New York, to be U.S. marshal for the western district of New York for the term of 4 years, vice George M. Glasser.

The following-named officer under the provisions of title 10, United States Code, section 3066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 3066, in rank as follows:

Lt. Gen. Earle Gilmore Wheeler, O18715, Army of the United States (major general, U.S. Army), in the rank of general.

CONFIRMATIONS

Executive nominations confirmed by the Senate, January 29, 1962:

BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM

George W. Mitchell, of Illinois, to be a member of the Board of Governors of the Federal Reserve System for a term of 14 years from February 1, 1962.

DIPLOMATIC AND FOREIGN SERVICE

AMBASSADOR

William E. Stevenson, of Colorado, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Philippines.

ENVOY

William A. Crawford, of the District of Columbia, a Foreign Service officer of class 1, to be Envoy Extraordinary and Minister Plenipotentiary of the United States of America to Rumania.

SECRETARY OF THE NAVY

Fred Korth, of Texas, to be Secretary of the Navy.

ASSISTANT SECRETARY OF THE AIR FORCE

Neil E. Harlan, of Massachusette, to be an Assistant Secretary of the Air Force.

ASSISTANT SECRETARY OF STATE

Frederick G. Dutton, of California, to be an Assistant Secretary of State.

UNDER SECRETARIES OF STATE

George W. Ball, of the District of Columbia, to be Under Secretary of State.

George C. McGhee, of Texas, to be Under Secretary of State for Political Affairs.

REPRESENTATIVE ON THE POPULATION COMMISSION OF THE ECONOMIC AND SOCIAL COUNCIL OF THE UNITED NATIONS

Dr. Ansley J. Coale, of New Jersey, to be the representative of the United States of America on the Population Commission of the Economic and Social Council of the United Nations.

U.S. ARMS CONTROL AND DISARMAMENT AGENCY

William C. Foster, of the District of Columbia, to be Director of the U.S. Arms Control and Disarmament Agency.

Adrian S. Fisher, of the District of Columbia, to be Deputy Director of the U.S. Arms Control and Disarmament Agency.

PRESIDENT'S SPECIAL REPRESENTATIVE AND ADVISER ON AFRICAN, ASIAN, AND LATIN AMERICAN AFFAIRS, AND AMBASSADOR AT LARGE

Chester Bowles, of Connecticut, to be the President's special representative and adviser on African, Asian, and Latin American affairs, and Ambassador at Large.

DIPLOMATIC AND FOREIGN SERVICE

U.S. AMBASSADORS

John O. Bell, of Maryland, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Guatemala.

John H. Burne, of Oklahoma, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Central African Republic.

Parker T. Hart, of Illinois, a Foreign Service officer of the class of career minister, now Ambassador Extraordinary and Plenipotentiary of the United States of America to the Kingdom of Saudi Arabia and Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Kingdom of Yemen, to eerve concurrently and without additional compensation ae Ambassador Extraordinary and Plenipotentiary of the United States of America to the State of Kuwait.

William J. Handley, of Virginia, a Foreign Service Reserve officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Mali.

Ridgway B. Knight, of New York, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Syrian Arab Republic.

Henry R. Labouisse, of Connecticut, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Greece.

Armin H. Meyer, of Illinois, a Foreign Service officer of class 1, to be Ambaseador Extraordinary and Plenipotentiary of the United States of America to the Republic of Lebanon.

Raymond L. Thurston, of Missouri, a Foreign Service officer of class 1, to be Ambaseador Extraordinary and Plenipotentiary of the United States of America to Haiti.

John M. Cabot, of the District of Columbia, a Foreign Service officer of the class of career minister, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Poland.

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